

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**Ralphs Grocery Company**

and

**United Food and Commercial Workers  
Union, Local No. 135,**

**United Food and Commercial Workers  
Union, Local No. 324,**

**United Food and Commercial Workers  
Union, Local No. 770,**

**United Food and Commercial Workers  
Union, Local No. 1036,**

**United Food and Commercial Workers  
Union, Local No. 1167,**

**United Food and Commercial Workers  
Union, Local No. 1428, and**

**United Food and Commercial Workers  
Union, Local No. 1442**

**Case Nos. 31-CA-27160  
31-CA-27475  
31-CA-27685**

**RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTIES'**  
**CROSS EXCEPTIONS**

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## **I. CHARGING PARTIES' CROSS EXCEPTIONS**

### **A. The Charging Parties' Cross Exceptions Should Be Overruled Because The McGowan Documents are Inadmissible Hearsay.**

The Charging Parties mistakenly claim that the *McGowan* documents are admissible under the public records hearsay exception (FRE 803(8)) or the residual exception (FRE 807). The *McGowan* documents<sup>1</sup> consist of an indictment and various correspondence and a trial memorandum. Specifically they are:

- (1) Indictment in the McGowan case, attached as Exhibit A to the Declaration of Shirley A. Lee in Support of Charging Parties' Motion to Reopen and Supplement The Record ("Lee Decl."), ¶ 3(a) & Ex. A.
- (2) Declaration of Michael M. Amir in Support of Defendant Scott Drew's Notice of Motion and Motion for an Extension of Time to File Discovery Motions, attached as Exhibit B to the Lee Decl., ¶ 3(b) & Ex. B.
- (3) Defendant Scott Drew's Notice of Motion and Motion for an Extension of Time to File Discovery Motions, attached as Exhibit C to the Lee Decl., ¶ 3(c) & Ex. C.
- (4) Government's Consolidated Response to the Motions of Defendants McGowan and Drew for Pretrial Discovery, attached as Exhibit D to the Lee Decl., ¶ 3(d) & Ex. D.
- (5) Government's Trial Memorandum, attached as Exhibit E to the Lee Decl., ¶ 3(e) \* Ex. E.
- (6) Defendant Scott Drew's Response to Evidentiary Arguments Raised in the Government's Trial Brief, attached as Exhibit F to the Lee Decl., ¶ 3(f) & Ex. F.

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<sup>1</sup> These documents are the so-called "*McGowan* documents" because they are pleadings and other documents from the *McGowan* matter: *United States of America v. McGowan, et al.*, Case No. CR-08-1116-PA.

Judge Kocol did not err in finding these documents inadmissible under the plain language of the public records exception in Federal Rule of Evidence 803(8) or the residual exception in Rule 807.

**1. Judge Kocol Correctly Concluded That The *McGowan* Documents Were Not The Better Available Evidence And Therefore That They Were Inadmissible Under FRE 807.**

Federal Rule of Evidence 807 permits the admission of evidence that is generally reliable and “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.”<sup>2</sup> The Jenks Act prohibits certain discovery with respect to witnesses “until said witness has testified on direct examination in the trial of the case.” 18 U.S.C. § 3500(a). Accordingly, the Charging Parties claim that the Jenks Act barred them from “request[ing] testimony or documents directly from the [U.S. Attorney’s Office] *in preparation for the February 27, 2007 hearing.*” (Charging Parties’ Cross Exceptions and Brief In Support of Cross Exceptions filed December 11, 2012 (hereinafter “Cross Exceptions”), at pg. 9 (emphasis added).) The Charging Parties argue, therefore, that the *McGowan* documents were “more probative” evidence within the meaning of 803(8) because they were the *only available* evidence.

There are two flaws with the Charging Parties’ conclusion. First, the Charging Parties could have—at any point in time, including at the original hearing in this matter—called a witness from Respondent and asked what documents had been disclosed to the USAO. Second, the Charging Parties could have called a witness from the USAO at the hearing before Judge

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<sup>2</sup> Although only 807(a)(3) is at issue (Cross Exceptions, at pg. 7, fn. 1), the full text of Rule 807 is:

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

Kocol to testify. The Charging Parties chose not to do either of these things, but they do not explain why they did not or could not. This evidence would have been more probative on the point of waiver than the *McGowan* documents which, as Respondent shows below, require multiple inferences to find a waiver.

Judge Kocol correctly determined that the *McGowan* documents were inadmissible under the residual exception of FRE 807.

**2. The *McGowan* Documents Are Not “Public Records” Within The Meaning of FRE 803(8).**

The Charging Parties complain that Judge Kocol did not cite any authority for his conclusion that the *McGowan* documents were not the type of documents admissible under FRE 803(8). But no citation was needed because the rule itself requires that conclusion.

Rule of Evidence 803(8), which governs the public records hearsay exception, does not apply to the *McGowan* documents or the Plea Agreement. Rule of Evidence 803(8) provides, in full:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

....

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office’s activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal Case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

The Charging Parties cannot rely on this rule. First, the *McGowan* documents are not “public records” within the meaning of 803(8) because, unlike, e.g., a conviction record which is

a statement of the court, many of the statements in the *McGowan* documents “are not statements of the United States Government.” *See Pendergest-Holt v. Certain Underwriters at Lloyd’s of London*, 751 F. Supp. 2d 876, 890 n. 52 (S.D. Tex. 2010) (rejecting the use of Rule 803(8) to admit statements of defendant in a plea agreement). Instead, half are statements of the defendants (Documents 2, 3 and 6) and the relevant portions of the grand jury indictment are similarly statements of defendants/employees. *Id.*

Second, none of the documents are one of the three types of documents admissible under this Rule, which are documents setting out: (1) the office’s records, (2) a matter observed under a legal duty to observe, or (3) factual findings from a legally authorized investigation. The documents are pleadings in a lawsuit (half of which are statements made by defendants, not the government) and an indictment. Filing a document in a court of law simply does not convert it to a “factual finding” or a “matter observed”. It is clear that the *McGowan* documents are not, as Judge Kocol correctly concluded, “the type of records covered by Rule 803(8) that would allow introduction for the truth of the matters asserted therein.”

The Charging Parties cite *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) for the proposition that the *McGowan* documents are admissible.<sup>3</sup> (Cross Exceptions, at pg. 10.) But *Beech Aircraft Corp.* deals only with the issue of whether “factual findings from a legally authorized investigation” are admissible as evidence of the finding, under then-current Rule of Evidence 803(8)(C), which is analogous to the current Rule of Evidence 803(8)(A)(iii). These documents are not “factual findings from a legally authorized investigation,” and *Beech Aircraft* is inapposite.

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<sup>3</sup> The Charging Parties additionally cite *Wong Wing Foo v. McGrath*, 196 F.2d 120, 123 (9th Cir. 1952). *Wong Wing Foo* does not apply statutes that are relevant here. *Id.* (citing 28 U.S.C. § 1733 (which, according to its own terms, does not apply to cases in which the Federal Rules of Evidence apply) & § 1732(a) (the cited section of which does not even exist anymore)).

*U.S. v. Jones*, 671 F. Supp. 2d 182, 184-85 (D. Me. 2009) is also distinguishable. In that case, the court applied the old version of FRE 803(8) which was more expansive and, importantly, *not expressly limited to statements of the government*.<sup>4</sup> Further, the court admitted the indictment and docket entries as proof that a prior conviction occurred for purposes of determining a heightened penalty. *Id.* Here, the Charging Parties are not seeking to show that the documents were filed or that the indictment was made, which would be an analogous use. Instead, the Charging Parties are offering them for the truth of the statements made in the pleadings regarding other matters.

Nor is the purpose of the rule furthered by admitting the *McGowan* documents. They are not one of hundreds of similar actions performed by the government every day, such as “routinely and mechanically kept I.N.S. records”. *See U.S. v. Agustino-Hernandez*, 14 F.3d 42, 43 (11th Cir. 1994). Instead the *McGowan* documents were documents that were drafted over a significant period of time by a variety of declarants for a variety of purposes.

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<sup>4</sup> The former version of FRE 803(8), effective in 2000 states:

(8) Public records and reports.-Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or -other circumstances indicate lack of trustworthiness.

FRE 803(8) (2000). This was superseded by the 2006 version, quoted in the text, which omits the prior broad introductory language “Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth...” and replaces it with “A record or statement of a public office if...”

Judge Kocol did not err in refusing to admit the *McGowan* documents under Rule 803(8).

Respectfully submitted,

Dated: December 21, 2012

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By: 

Timothy F. Ryan

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RALPHS GROCERY COMPANY

**CERTIFICATE OF SERVICE BY U.S. MAIL**  
**[FED. RULE CIV. PROC. RULE 5(B)]**

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on the date hereof, I served a copy of:

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PARTIES' CROSS EXCEPTIONS**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 555 West Fifth Street, Los Angeles, California 90013-1024 in accordance with Morrison & Foerster LLP's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

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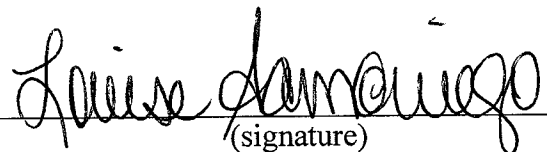
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I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, this 21<sup>th</sup> day of December, 2012.

Louise J. Samaniego  
(typed)

  
(signature)